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September 21, 1993

NORWAY AND WHALING

Introduction

In May 1993, the Government of Norway licensed its nationals to harvest 160 minke whales as part of its traditional coastal whaling and 136 minke whales under its scientific research program. Norway has based its decision to resume traditional coastal whaling on sound scientific principles and has acted in accordance with international law and internationally accepted environmental principles. Due to the lack of progress in the IWC, Norway took action on the basis of the best scientific findings.

On August 5, 1993, the Secretary of Commerce certified to the President that, under the Pelly Amendment (22 U.S.C. § 1978), Norway has "diminished the effectiveness of the conservation program of the International Whaling Commission" by resuming traditional coastal whaling of the minke whale. Under the terms of the Pelly Amendment, the President has the discretionary authority to impose trade sanctions against any Norwegian product.

Discussion

I. NORWAY HAS NOT IN ANY WAY DIMINISHED THE EFFECTIVENESS OF THE INTERNATIONAL WHALING COMMISSION (IWC) CONSERVATION PROGRAM. NORWAY HAS RESUMED THE TRADITIONAL COASTAL WHALING OF MINKE WHALES IN FULL CONFORMITY WITH THE RECOMMENDATIONS OF THE IWC'S SCIENTIFIC COMMITTEE, THE TENETS OF THE INTERNATIONAL CONVENTION FOR THE REGULATION OF WHALING (THE "CONVENTION"), AND THE BASIC PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW.

A. Norway's whaling program is fully supported by the conclusions and recommendations of the IWC's Scientific Committee.

1. The IWC Scientific Committee has unanimously estimated the size of the stock of the Northeast Atlantic minke whales and recommended to the Commission a revised management procedure. In 1992, the Scientific Committee unanimously concluded that the minke whale is in no danger of depletion, with an estimated 86,700 minke whales in the Northeast Atlantic alone. At the 1993 IWC meeting, the Scientific Committee unanimously recommended to the Commission the approval of a procedure for harvesting whales on a sustainable basis.

2. In implementing its whaling policy, Norway will adhere to a quota that is consistent with the Revised Management Procedure recommended by the IWC Scientific Committee. The total catch permitted in 1993 was set even lower than the minimum quota permitted under the Revised Management Procedure.

3. *Norway has strictly regulated all aspects of its whaling program to ensure compliance with principles endorsed by the IWC Scientific Committee.* Norway has implemented an inspection program which places an inspector, who is a trained veterinarian, on-board all whaling vessels to ensure compliance with quotas and humane killing requirements. Proficiency tests and a three-day course were required for whalers engaged in the shooting of animals and strict standards have been established with regard to what sea conditions and shooting ranges are permissible for active harvesting. Norway has also ensured that exploding harpoons have been improved and tested to prevent malfunctions.

B. Norway's whaling program is in full compliance with the terms of the International Convention for the Regulation of Whaling. Rather, it is the IWC which has strayed from the terms and mandate of the Convention.

1. *Norway filed a timely objection to the 1982 moratorium and, therefore, pursuant to the rules of the Convention, is not bound by the moratorium.* Article V of the Convention expressly permits a member nation to file an official objection to specific IWC decisions. The filing of such an objection makes the IWC decision inapplicable to the objecting nation. Norway has presented two such formal objections to the IWC, one with regard to the commercial whaling moratorium and one with regard to the 1985 classification of the Northeast Atlantic minke whale as a protected stock. The 1985 classification was based on the assumption that the stock consisted of only 20,000 animals.

2. *The Commission has failed to adhere to the terms of the Convention requiring that the IWC base all its decisions on scientific evidence.* In 1986, the IWC imposed a moratorium prohibiting commercial whaling to allow scientists to assess whale stocks. The moratorium decision was made despite the Scientific Committee's advice to the contrary. The moratorium called upon the IWC to undertake a comprehensive assessment of whale stocks by 1990 at the latest. Later, the Commission asked the Scientific Committee to develop a Revised Management Procedure for the harvesting of whales. At the 1993 IWC meeting, the Scientific Committee unanimously recommended assessments on the size of certain whale stocks and a Revised Management Procedure for the harvesting of whales. However, the Commission chose to ignore the recommendations of its Scientific Committee for political reasons. In May 1993, the Chairman of the Scientific Committee resigned in protest over the IWC's failure to respond to the recommendation and advice of the Scientific Committee.

3. *The IWC has also strayed from its original purpose -- to "provide for the proper conservation of whale stocks and thus to make possible the orderly development of the whaling industry."* Its mandate is to amend specific regulations that will enable nations to safely and sustainably harvest whales. Norway respects this mandate and has sought to work within the IWC to implement a procedure for the sustainable management of whale stocks.

C. Norway's whaling program is based upon the internationally endorsed principle of sustainable development.

1. *Norway's chief environmental objective is to preserve nature's diversity and manage its resources so that they remain available for future generations to utilize. This is the concept of "sustainable development".* Norway has taken a leading role internationally on the environment and has received universal recognition for its pro-environmental policies. Moreover, as a coastal, mountainous nation, Norway is dependent on the utilization and harvesting of the living resources of the sea. Thus, it is of paramount importance that management and use of living resources be based on a sound scientific and sustainable basis. As such, Norway advocates the protection of all species threatened with extinction or serious depletion.

2. *Resuming the limited harvest of minke whales is in full conformity with both the spirit and content of the 1992 UNCED declarations on sustainable development.* In Rio de Janeiro, the 1992 UNCED endorsed the principle of sustainable management and use of marine living resources, including marine mammals, on a scientific basis. UNCED also endorsed the sovereign right of each nation to use its natural resources sustainably. Norway signed all the relevant decisions at Rio, and indeed led international efforts on these issues and continues to do so.

3. *Maintenance of an objective standard of sustainable development, uncolored by cultural biases, is the only basis on which international agreement can be achieved.* The concept and implementation of international conservation programs is simply unworkable without adherence to scientific principles, since nations will always differ in the social and cultural perspectives which they bring to international environmental issues. It is difficult to see how international conservation decisions made by politically, culturally, and socially diverse nations can rationally be made on any other basis.

- D. Norway's whaling activities are not in contravention of any international treaty; they are simply at odds with the political and cultural views of a majority of IWC members, which have chosen to disregard the scientific and legal basis upon which the IWC was founded.

1. *The United States has publicly conceded that its position on any resumption of traditional coastal whaling has no foundation in scientific principles of conservation, but rather is grounded in American public opinion.* In its policy statement provided to the Norwegian Embassy prior to the 1993 IWC meeting in Kyoto, the U.S. stated:

Since ... scientific analysis now shows that some populations of minke whales are likely to be able to sustain a limited harvest, it was time to review U.S. policy....

As evidenced by the unanimous vote in the House for a resolution to ban commercial whaling, there is presently no support in the U.S. Congress or among the American public for commercial whaling....

In making this decision (to oppose resumption of commercial whaling), the United States is not challenging the IWC's scientific assessments upon which a resumption of commercial whaling might be based."

2. *The United States appears willing to abandon the standards of sustainable development in the context of whale conservation -- a policy which will put every other international environmental effort at risk.* It is not Norway's decision to resume scientifically supported limited whaling that diminishes the effectiveness of conservation programs, but rather nations making decisions based on perceived domestic public opinion rather than sound science.

3. *Despite domestic opposition to the practice of whaling, the United States permits the whaling of an endangered species in Alaska.* The U.S. has granted the native population of Alaska the right to harvest endangered bowhead whales under the quotas set by the IWC.

II. ANY IMPOSITION OF TRADE SANCTIONS BY THE UNITED STATES WOULD BE UNPRECEDENTED, INCONSISTENT WITH THE GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT), AND INCONSISTENT WITH THE PELLY AMENDMENT.

A. The imposition of trade sanctions under the Pelly Amendment would be an unprecedented action. The Pelly Amendment has never been used to impose trade sanctions against another nation. Moreover, the imposition of trade sanctions against a NATO ally and world environmental leader in response to perceived U.S. public opinion would seriously call into question the international trade policy of the U.S.

B. Any imposition of a ban on Norwegian products under the Pelly Amendment would violate several of GATT's most fundamental obligations, and thus would also be inconsistent with the Pelly Amendment itself, which requires that any trade restriction imposed by the President be consistent with GATT.

1. *The imposition of trade sanctions under the Pelly Amendment would violate the GATT Article XI prohibition on quantitative restrictions, the most-favored-nation principle of GATT Articles I and II, and the national treatment principle of GATT Article III.*

a. An import ban on Norwegian products would violate the Article XI prohibition against quantitative restrictions. Article XI contains an absolute prohibition on quotas, including the import ban contemplated under the Pelly Amendment.

b. The most-favored-nation principle of Articles I and II prohibits treating the products of one GATT member less favorably than those of any other. By singling out Norwegian products from those of other nations, restrictions under the Pelly Amendment would violate this principle.

c. The national treatment principle of Article III prohibits treating imported products less favorably than domestic products. Any treatment of imported Norwegian products under the Pelly Amendment that is less favorable than the treatment of like domestic products would violate Article III.

2. *Violation of these articles would not be justified by any exceptions in the GATT, such as the exception in Article XX(b) for measures necessary to protect animal life or health, or the exception in Article XX(g) for measures relating to the conservation of exhaustible natural resources.*

a. A GATT panel has ruled that the Article XX(b) and (g) exceptions only allow a GATT member to impose trade restrictions to safeguard resources within its own territorial jurisdiction. The panel ruled that the U.S. could not ban imports of Mexican tuna in order to force Mexico to adopt more dolphin-safe fishing practices. Furthermore, a recent GATT Secretariat's Report on Trade and the Environment rejects unilateral trade measures adopted by one country to coerce another country to change its domestic environmental policies. Thus, the U.S. may not restrict trade in Norway's imports in order to affect Norway's management of minke whales in the Northeast Atlantic.

b. A restriction on Norway's imports under the Pelly Amendment would fail the Article XX(b) requirement that such measures be "necessary" to protect animal life, as well as the Article XX(g) requirement that such measures "relat[e] to" the conservation of exhaustible natural resources. Under the GATT, a measure is not "necessary for" or "primarily aimed at" conservation or the protection of animal life if it could have the incidental effect of protecting U.S. industries from import competition. This is so even if the principal motive for the measure is to protect wildlife species. Moreover, given the evident fact that Norway's harvest of 296 minke whales will have no adverse impact on the population, a trade ban is neither "necessary" for, nor "relate(d) to," the protection of whales.

3. *The Pelly Amendment permits the President to impose trade sanctions against the offending country "to the extent that such prohibition is sanctioned by the General Agreement on Tariffs and Trade" (22 U.S.C. 1978(a)(4)). As demonstrated above, trade sanctions under the Pelly Amendment in this case are clearly inconsistent with the GATT.*

Conclusion

In making its decision regarding the possible imposition of trade sanctions against Norway, the United States should consider carefully the precedent it will set with regard to international environmental issues. The achievement of environmental goals on a worldwide basis requires mutual respect for cultural differences and rational decision making based on the best scientific evidence achievable. There is no other basis on which consensus and commitment can be obtained among nations with populations which hold diverse views on many social, cultural, and political issues. Consensus and cooperation cannot be achieved through coercion based on the politics of the moment.

Norway rests its case on undisputed science. The imposition of trade sanctions would be inconsistent with both the Pelly Amendment itself and the trade principles to which the United

States subscribes under the GATT. Norway urges the United States not to take this step.